BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I

OPINION BELOW

The opinion for the Circuit Court of Appeals for the Third Circuit, filed January 25, 1943, has not yet been officially reported, but a copy is to be found in the record (R. 77a).

II

STATEMENT OF THE CASE

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed January 25, 1943, affirming his conviction and sentence entered in the United States District Court for the District of New Jersey on July 30, 1942, after a trial before the Honorable John Boyd Avis and a jury.

The facts have been set forth in the foregoing petition (pp. 1-4) and will not be repeated.

III

ARGUMENT

1. The Mann Act Was Never Intended to Apply to the Present Circumstances

The facts herein disclose a case of fornication and nothing more.

In its opinion, the Circuit Court determined that since this Court had overruled, in the case of *United States v. Caminetti*, 242 U. S. 470, the contention that the Mann Act applied only to cases of commercialized vice and prostitution, it would not consider the argument made by appellant in the instant case.[1] We shall not stop to consider whether the Circuit Court was duty-bound to follow a 1916 decision of this Court without any analysis thereof. Cf. *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, 217; aff'd. 87 L. ed. 329; 63 S. Ct. 339. We do, however, urge this Court to reconsider its divided decision and hold that the Mann Act should not be applied to a situation involving the facts of the case at bar.

The majority opinion in the *Caminetti* case apparently recognized the existence of the right of a court to consider congressional reports in reaching the true meaning of a legislature in cases involving the interpretation of a statute. However, the Court then determined that the meaning of the Mann Act was clear and therefore no recourse to any source was necessary to determine legislative intent.

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[1] cf. *Spies v. United States*, ... U. S. .....; 87 L. ed. 342, 343; 63 S. Ct. 364, 365.

The dissenting Justices, on the other hand, considered the purpose and historical background of the Act and concluded that it was meant to apply only to cases of true "white slavery"; that is, to cases of prostitution and commercialized vice.

Our point is that it is anomalous to call the language of a statute clear where previous federal decisions had found it ambiguous (cf. *Welsch v. United States*, 220 F. 764, 771) and where this Court itself divided five to three in its result.

However, even if it be assumed arguendo that the language of this Act is clear, this Court has recently said in *Harrison v. Northern Trust Co.*, U. S. ; 87 L. ed. 320, 322; 63 S. Ct. 361, 363:

> "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination"' ".

In this connection, it is interesting to note several of the authorities relied upon by Mr. Justice Jackson in his dissenting opinion in the case of *United States ex rel. Marcus v. Hess*, U. S. ; 87 L. ed. 374, 384; 63 S. Ct. 379, 390, wherein he quoted from *United States v. Katz*, 271 U. S. 354, in which the present Chief Justice said:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, consistent with the legislative purpose."

And what is most amazing, in *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, Justice Day, writing in

1907, *nine* years before his opinion in the *Caminetti* case, adopted the point of view which we are presently urging and said:

> "But in construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.
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> It is true, and the plaintiff in error cites authorities to the proposition, that where the words of an act are clear and unambiguous they will control. But while seeking to gain the legislative intent primarily from the language used, we must remember the objects and purposes sought to be attained."

The language of Mr. Justice Frankfurter in his dissenting opinion in the case of *United States v. Monia,* U. S. ; 87 L. ed. 297, 301; 63 S. Ct. 409, 412-13, is especially applicable:

> "This question cannot be answered by closing our eyes to everything except the naked words of the Act of June 30, 1906. The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. * * * A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated."

We can find no other case of statutory construction in any jurisdiction in which the Court reached a result contrary to the *expressed* intent of the legislature enacting the law. We think a result so incongruous on its face should be reviewed by this Court.

The present tendency of this Court has been to rely strongly on legislative history and reports in determining the true meaning of a statute: *United States v. Hutcheson*, 312 U. S. 219, 236; *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U. S. 91, 101-102; *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *United States v. San Francisco*, 310 U. S. 16. In his dissenting opinion in the first case above cited, Mr. Justice Roberts said (pp. 244-5):

> "The title and the contents of that Act, as well as its legislative history demonstrate beyond question that its purpose was to define and limit jurisdiction * * *."

See also *United States v. Local 807*, 315 U. S. 521.

It is interesting to note that the Mann Act, in Section 8, provides that it shall be known and referred to as the "White Slave Traffic Act". We contend that this fact, along with the stated purpose of the Act as expressed by its sponsor,[2] compels the conclusion that the Act was certainly never meant to apply to a case of simple fornication. As was said in *United States v. Dickerson*, 310 U. S. 554, 562:

> "The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction."

The Court in the *Caminetti* case completely overlooked another rule of statutory construction, to wit, that a criminal statute must be strictly construed. The application of this rule in conjunction with the reports in the Congressional Record and the opinion of the then Attorney General (Dissenting Opinion in *United States v. Caminetti*, 242 U. S. 470, 498-499) would lead with compelling force

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[2] cf. *United States v. Monia*, 87 L. Ed. 297, 300; *United States ex rel. Marcus v. Hess*, 87 L. ed. 374, 378.

to a reversal of the *Caminetti* case: *Prussian v. United States*, 282 U. S. 675; *Farmer v. United States*, 128 F. 2d 970.

We contend that the *Caminetti* case was wrongly decided and urge its reversal. We might point out, however, that the facts and the indictment herein do not approach those in that case. Here, the indictment charges, and the facts establish, at most illicit sexual intercourse. In the *Caminetti* and *Diggs* cases, the indictment charged and it was proved, that the girls were transported for the purpose of debauchery and for the purpose of making them the concubines and mistresses of the defendants. In the related *Hays* case, the indictment charged defendant with transporting an unmarried woman under eighteen years of age, with the intent to induce her to engage in prostitution, debauchery and other immoral purposes.

A search of the cases in the past ten years reveals no conviction sustained for violation of the Mann Act where the facts show the defendant to be guilty of fornication only.

We urge this Court to review the conviction in this case to settle finally the question of the scope of the Mann Act.

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2. There Was Insufficient Evidence to Submit to the Jury

The sole question in this case was whether petitioner intended, at the time he arranged to pay for the woman's fare from Camden, New Jersey to Miami, Florida, to have sexual relations with her upon her arrival. The element of persuasion and enticement was removed by the trial judge's direction of a verdict of not guilty on Count 2 of the indictment.

There is no denial that petitioner paid for the transportation and that he had intercourse with the woman. It was necessary for the Government to prove, however, that this intent was formed at the time the interstate journey was planned since it is well settled that the commission of an immoral act at the end of an interstate journey does not constitute a violation of the Act: *Yoder v. United States*, 80 F. 2d 665, 670; *Sloan v. United States*, 287 F. 91, 93; *Fisher v. United States*, 266 F. 667, 670; *Biggerstaff v. United States*, 260 F. 926, 928. But we contend that her testimony, uncontradicted and unchallenged in any way or by anyone, conclusively demonstrates that petitioner did not have the intent charged.

We quote the pertinent testimony upon this point:

"Q. Did you discuss the trip with him before he left?

A. No, I did not.

Q. Did he say anything to you about his going?

A. I knew he was going.

Q. Through him or through some other means?

A. Through him.

Q. He told you?

A. Yes.

Q. Did you have any other conversation with him at that time?

A. No." (R. 11a-12a)

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"Q. Did you have conversations with him about Florida when he called you?

A. Not the first few times.

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"Q. Did you eventually have a conversation with him in that respect?

A. Yes, I did * * * That I was coming down to Miami for a vacation." (R. 14a)

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"Q. What was the rest of the conversation?

A. Well, he objected at first and said that the weather was not good at the time, and *he did not think I should go down, but I insisted and told him I was going there anyhow,* and then he asked me how I was going to get there and I *asked him if he would pay for the fare.*

Q. What did he say to you?

A. Well he would not answer me. *He said, 'I would like to speak to your father first.'* " (R. 14a)

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"Q. What did he say this time?

A. Well, *after my father had gave his consent* he said, 'I will make reservations for you and call you up again and let you know just when to come down.' " (R. 15a-16a)

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"Q. Where did you go from the airport?

A. He wanted to get me a place to stay. He wanted to get me my room.

The Court: Where did you go?

The Witness: I asked him to take me to his room as I wanted to wash up first and rest, and then I would decide where I would stay.

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"Q. Did you get to Mr. Reginelli's room?

A. Yes.

Q. Where was it?

A. At the President Madison Hotel.

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"Q. What happened after you got to the room?

A. Well, when I got there I decided I did not want to stay alone so I *asked to stay with him. He objected at first but I insisted.*

Q. You insisted on staying with him?

A. Yes.

Q. When you met him first, did he say whether or not he had any other room to take you to?

A. No, but he said he would get me a room." (R. 27a-28a)

This testimony was elicited on *direct* examination, in response to questions asked by the Government attorney. The Government did not in any way attack this witness's testimony. Petitioner's counsel asked no questions on cross examination.

We submit that the action of the trial Judge and the verdict of the jury are sustainable only if the above quoted testimony is disbelieved and, under the authorities, it would be highly improper to do so: 32 C. J. S., page 1089, Section 1038; cf. *Quock Ting v. United States,* 140 U. S. 417.

This is not the case of an improbable story, filled with inconsistencies, told by someone unworthy of belief: cf. *United States v. Simon,* 119 F. 2d 679, cited in the opinion of the Circuit Court. Rather, it is the case of a perfectly consistent story told by the principal witness for the Government and relied upon by it for the conviction.

Under these circumstances, we urge this Court to adopt the rule that, in a criminal case, the testimony of a prosecution witness which is uncontroverted and unchallenged, may not capriciously be disregarded by either the trial Judge or the jury.

It is incredible that any criminal intent in petitioner can be found if the woman's testimony is believed. Surely

there is not that clear and convincing evidence which the authorities require: cf. *Alpert v. United States*, 12 F. 2d 352, 354.

We contend that it was error for the trial Judge to submit this case to the jury.

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3. The Evidence Being Circumstantial and Not Excluding Every Hypothesis but That of Guilt, the Trial Judge Erroneously Permitted the Case to Go to the Jury

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Admittedly, the government's case rests wholly upon circumstantial evidence and the rule, supported by a host of cases in all jurisdictions, is that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of an appellate court to reverse a judgment of conviction.

The Circuit Court adopts the view that a defendant is protected if the trial Judge properly instructs the jury on the rule of circumstantial evidence. We contend that this is in conflict with the previous rule of the Third Circuit. (*United States v. Tatcher*, 131 F. 2d 1002; *United States v. Russo*, 123 F. 2d 420), and also the rule of the majority of other jurisdictions (*Leslie v. United States*, 43 F. 2d 288, 290).

In the *Tatcher* case, the court said (p. 1003):

> "It would be equally consistent with the evidence to infer that all the merchandise not stolen, broken or found on the premises was sold and the proceeds used to pay the business and personal expenses of the defendant and his partner as to infer that all or any

> part of that merchandise was concealed by the defendant. To justify conviction of crime where the evidence relied upon is circumstantial in nature the evidence must be such as to exclude every reasonable hypothesis but that of guilt * * *"

By the same token, in the case at bar, it would be equally consistent with the evidence to infer that petitioner had no desire for or thought of any immoral purpose when he arranged for the woman's transportation—and, at any rate, the evidence certainly does not exclude every hypothesis but that of guilt.

It seems incredible that petitioner be charged with the criminal intent necessary where the uncontradicted evidence shows his opposition to the trip, his ascertaining from the woman's father whether he would consent to her leaving, his suggestion, upon her arrival in Florida, that he obtain a room for her and his objection to her staying with him.

We submit that the case against this petitioner is the weakest ever to go to a jury in a Mann Act prosecution. A comparison of the facts of other Mann Act cases wherein there have been reversals because of the failure of the trial Judge to direct a verdict makes even more striking the lack of evidence in the present case: *United States v. Grace*, 73 F. 2d 294; *Hunter v. United States*, 45 F. 2d 55.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decision.

William A. Gray,
Counsel for Petitioner.